In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~617~~ 26

JOHN BURRELL GARNER, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

No. ~~618~~ 27

MARY BRISCOE, ET AL., ~~PETITIONERS~~

v.

STATE OF LOUISIANA, RESPONDENT

No. ~~619~~ 28

JANNETTE HOSTON, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

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OPPOSITION TO GRANTING WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The Federal Questions presented in each of the above three (3) entitled and numbered causes are identical as will be seen by reference to page 2 of each of the petitions for writs of certiorari. Also, as will be seen by reference to the three petitions for writs of certiorari filed by petitioners, the arguments made in support of each petition are the same. Further-

more, the facts in each case are substantially the same with only minor variations.

Therefore, in accordance with the Revised Rules of this Honorable Court, respondent shall file one brief in opposition to the petition for writs of certiorari in all three cases.

The first and primary portion of the brief in opposition will deal specifically with case No. 619, *Jannette Hoston, et al, v. State of Louisiana*. The arguments given, and authorities cited, in support of respondents opposition in this case are hereby adopted, in toto, in support of the other two (2) cases. At the end of the main body of the brief in opposition to the petition in the *Hoston* case, we submit brief additional arguments in each of the other two (2) cases.

QUESTIONS PRESENTED

Petitioners, grown Negro men and women, residents of the City of Baton Rouge and Parish of East Baton Rouge, State of Louisiana, or at least temporarily residing therein while attending Southern University, went into Kress' Department Store and sat down at a lunch counter at which they knew, or should have known, they were not wanted by the owner and/or manager of said store; after being informed that they would be served at another counter within the store, petitioners continued to stay at the first counter, thereby refusing to go to the counter to which they were directed; thereafter, after the man-

ager of the store had called the local law enforcement officers, and after said officers had requested them to leave the counter, they again refused to leave; for this they were arrested and subsequently convicted under the provisions of a valid state law proscribing the commission of an act "in such a manner as to unreasonably disturb or alarm the public"; there being evidence that they knew, or should have known, that their acts in refusing to go to the counter and area of the store as directed by the manager and their refusal to leave the store as requested by the local law enforcement officers would result in a disturbance and could foreseeably result in disorder and public alarm. Under the circumstances, were petitioners deprived of rights protected by the:

1. Due process clause of the Fourteenth Amendment in that they were convicted on a record containing evidence that their acts in refusing to recognize the right of others could foreseeably result in a disturbance, the use of physical force, and probable grave disorder and public alarm;

2. Due process clause of the Fourteenth Amendment in that they were convicted under a penal provision which any reasonable man would know proscribed the act which they committed, that is, deliberately participating in a demonstration on private property, in opposition to the owner's rights, against the owner's wishes, and refusing to leave when requested to do so, thereby requiring the use

of physical force by the owner to protect his rights.

3. Due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that they were arrested and convicted under a valid statute of the State of Louisiana which was adopted for the purpose of preventing breaches of the peace and for the purpose of providing that all citizens of the State of Louisiana could continue their normal course of business and activities, as they have a right to do, without being unreasonably disturbed or alarmed; and without abandoning their own rights because of the deliberate acts of the defendants.

4. Due process clause of the Fourteenth Amendment, as that clause incorporates First Amendment type protection of liberty of expression, but when neither the Fourteenth Amendment nor the First Amendment guarantees the right of freedom of expression upon premises belonging to another and upon premises in which petitioners had not been invited to express themselves, and on premises in which petitioners had been specifically requested to leave.

STATEMENT OF THE CASE

The statement of the case contained in petitioners applications for writs of certiorari although accurate in part, is sufficiently inaccurate that a separate statement of the case is hereafter set forth. This statement of the case will apply primarily to case No.

619, *Jannette Hoston, et al, v. State of Louisiana.* Any variation in the factual situation of the other two (2) cases will be set forth separately at the end of this brief when brief additional argument will be presented as to the other two (2) cases.

In the instant case, the law enforcement officials of the City of Baton Rouge acted pursuant to their duty and responsibility to preserve peace and order in the community and to prevent the commission of acts which could foreseeably result in unreasonably disturbing or alarming the general public. The police officers acted only after being called by the manager of a local department store, Kress's store, and after being informed that certain persons in the store were conducting themselves in a manner likely to result in a disturbance and because he, (the manager), "feared that some disturbance might occur" (RT 13) in that these persons had refused to remove themselves from a particular area of the store as requested by the manager or employees. The officers, acting in accordance with their duty and responsibility to the community, requested these persons peaceably to leave. Again they refused to leave and were thereafter arrested and charged with violating the statute in question.

On March 28, 1960, petitioners in the instant case entered the premises known as Kress' Store in Baton Rouge, Louisiana. They then proceeded to sit down at a lunch counter within said store at which they knew, or should have known, they were not

wanted. They went there for the stated purpose of protesting segregation in a manner in which they knew, or should have known, was likely to cause a disturbance and unreasonably disturb or alarm the public. The motion to quash filed by petitioners in the District Court specifically states in paragraph six (6) thereof:

> "That while the arrests and charges were for disturbing the peace, there was not a disturbance *except for the activity in which defendants engaged to protest segregation*, ... " (emphasis supplied by the writer)

and, in paragraph seven (7) thereof:

> " . . . that your defendants, *each, in protest of the segregation laws of the State of Louisiana, did* on the 28th day of March, 1960, *"sit-in" a cafe counter seat* reserved for members or persons of the white race, ... " (emphasis supplied by the writer) (RQ 7-10)

The petitioners, after seating themselves at the counter reserved for white persons by the management, which petitioners knew, or should have known, was the custom of that store, refused to leave said counter when directed to do so by the manager or employees. All of the petitioners are either residents of Baton Rouge or have resided in that city for some length of time while attending Southern University. They knew, or should have known, as did all other citizens of Baton Rouge, that the owners and/or operators of that private facility maintained separate

lunch counters for members of the white and Negro race.

Since petitioners, by remaining at said counter after having been told that they would be served elsewhere, refused to leave said counter as directed, the manager called the police. The manager testified that he called the police because he "feared that some disturbance might occur" (RT 13). The police upon arriving, and in the performance of their duty and responsibility to prevent disturbances and protect the rights of all citizens, including the owners and operators of Kress' Store, quietly requested the petitioners to observe the right of the manager and owner and leave the counter. It was only after the petitioners refused to comply with this lawful request that they were arrested and charged with a violation of state law (RT 20 and 21).

Thereafter, in due, orderly and constitutional procedure, and after petitioners were given every opportunity to file all motions and to present whatever testimony they desired, the trial Judge rendered an oral opinion which is contained at pages 22 and 23 of the record of the trial, and which is quoted below with emphasis supplied by the writer:

> "The evidence in this case put on by the State *is not disputed* and it is to the effect, that these accused were in Kress' Store in Baton Rouge on the date alleged in the Bill of Information, and that they took seats at the lunch counter which by custom had been reserved for white people

only. *They were advised by an employee of that store, or by the manager, that they would be served over at the other counter* which was reserved for colored people. *They did not accept that invitation;* they remained seated at the counter which by custom had been reserved for white people. The officers were called and the officers talked to the accused, or some of them, and the defendants continued to remain seated at this particular counter. *That testimony is uncontradicted,* and, in the opinion of the Court, the action of these accused on this occasion was a violation of Louisiana Revised Statutes Title 14, Section 103, Article 7, *in that the act in itself, their sitting and refusing to leave when requested to, was an act which foreseeably could alarm and disturb the public,* and therefore was a violation of the statute that I have just mentioned. I accordingly find each and every one of them guilty as charged, having been convinced beyond a reasonable doubt of their guilt."

REASONS FOR DENYING THE APPLICATION FOR WRIT OF CERTIORARI

For purposes of clarity and logical order, our brief will discuss each point argued by petitioners application in the order in which they appear in said application commencing with page 11 thereof.

1.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

A.

The decision below affirms a criminal conviction based upon acts committed in carrying out an unwanted demonstration on private property and a continuation of such demonstration after having been asked to cease and desist by the owner of said property and by local law enforcement agents performing their duty and responsibility to prevent breaches of the peace.

The trial Judge, being the best judge of the witnesses, evidence, and circumstances in the trial court, found that the acts of petitioners, based on evidence presented and surrounding circumstances, were committed in such a manner as to foreseeably alarm and disturb the public and result in a breach of the peace. His decision does not, therefore, conflict with this courts decision in *Thompson v. City of Louisville*, 362 US 199.

That the decision in the case of *Thompson v. City of Louisville* is not applicable to the instant case, is clear when the facts and laws involved in the two cases are compared. The ordinance involved in the *Louisville* case provides in part as follows:

> "It shall be unlawful for any person . . . , without visible means of support, or who cannot give a satisfactory account of himself, . . . to sleep, lie, loaf or trespass in or about any prem-

> ises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . . . "

The defendant obviously "had visible means of support" in that he was "a long time resident of the Louisville area"; he bought and paid for food and drink; he had a home in Louisville; he "had money with him"; "that he owned two unimproved lots of land"; that "in addition to work he had done for others, he had regularly worked one day or more a week for the same family for thirty (30) years".

The defendant did "give a satisfactory account of himself" as required by the ordinance in that he had purchased food and drink in an establishment open for that purpose; he testified that he was waiting for a bus and had with him "a bus schedule showing that a bus to his home would stop within half a block of the cafe at about 7:30"; and the cafe manager testified that the defendant was a frequent patron of the cafe. He did not "sleep, lie or loaf" about the premises. He did not "trespass" as the manager testified "that he did not, at any time during petitioners stay in the cafe, object to any thing petitioner was doing" and that the defendant was "welcome there". And as the court said, "surely this is implied consent, which the city admitted in all arguments satisfies the ordinance".

With respect to the disorderly charge in the *Louisville* case, the ordinance there provided "whoever

shall be found guilty of disorderly conduct in the City of Louisville shall be fined . . . . " As the court pointed out, this ordinance gives no definition whatsoever of what would constitute "disorderly conduct" nor does it give any guide that a reasonable man could use to determine what course of conduct would constitute "disorderly". Furthermore, the only evidence of disorderly conduct was the statement by the police officer that defendant was very "argumentative". In the instant case, the petitioners were not charged with disorderly conduct, they were charged with committing an act in a manner which could foreseeably disturb or alarm the public.

Now, let us examine the true facts in the instant case. During late 1959 and the early part of 1960, Negro men and women throughout many cities and states in the South, took part in the so called "sit-in" demonstrations at lunch counters in various stores. On many occasions, these "sit-ins" in other cities resulted in violence, grave disorder, and pitched battles in the street between members of the Negro and white races. In many instances, these demonstrations resulted in arrests of both Negro and white persons on charges of "disturbing the peace" and "disorderly conduct". These happenings, and the resulting violence, were reported in many issues of the Morning Advocate and State Times, the only morning and afternoon newspaper in Baton Rouge. These occurances were also reported in the weekly "Newsleader" a newspaper published for, and distributed to, the

Negro citizens of Baton Rouge. The petitioners herein had complete access to these newspapers as did all other citizens of our community. Consequently, it can be assumed by this court that the petitioners knew of these demonstrations and knew of the violence and disorder which had resulted from same in other cities. It can also be assumed by this court that they must have known that it was foreseeable that violence and disorder would result from their participating in such a demonstration on private property in Baton Rouge, Louisiana, against the wishes and established policy of the owners.

Furthermore, the petitioners herein were either long time residents of Baton Rouge, or at least, residents of some length of time while attending Southern University. Therefore, this court can assume that they knew, just as every other person in Baton Rouge knows, that Kress' Department Store is a privately owned store and that the premises on which it is situated are privately owned premises. Petitioners must also have known, as does every other citizen of the Baton Rouge community, that the private owner and proprietor of Kress' Department Store maintained a policy of separate eating facilities for members of the Negro and white races. Knowing this, the petitioners must also have known, and this court can assume they did know, that they not only were not invited, but were not welcome, to sit down at the lunch counter reserved for members of the white race. This long and publicly known policy of Kress' Department

Store in Baton Rouge, in itself, is sufficient for the court to infer an "implied objection" just as it inferred an "implied consent" in the Louisville case.

Yet, the petitioners herein, grown and presumably reasonable people, went on these private premises for the deliberate and avowed purpose of participating in a "sit-in" demonstration "in protest of the segregation laws of the State of Louisiana". (RQ 7-10 and application for writs, page 23) We submit that any normal, reasonable man could reasonably foresee that such acts, for such a purpose, and in such a manner, under existing circumstances would unreasonably disturb or alarm the public.

However, there are other facts which substantiate this position. After seating themselves at the lunch counter from which they knew they were prohibited by policy of the owner and management of the store, the petitioners were told that they would be served at the "counter across the aisle". (RT 13) It would seem apparent to the writer, that under existing circumstances, any reasonable person would have inferred from that statement that they would not be served at the counter at which they were sitting and were being requested to go to the other counter for service. Surely, in view of the above, this court can take the same position here, that this was an "implied objection", that it did in the *Louisville* case when it assumed from the testimony of the manager that he did not object to what the defendant was doing that "surely this is implied consent".

Thereafter, the manager called the police because he "feared that some disturbance might occur" (RT 13). Furthermore, the manager also testified that he called the police because the petitioners would not leave the counter as he requested. (RT 14, set forth below.)

Question:

When service was offered them at the colored counter they didn't move?

Answer:

No.

Question:

And thats why you called the officers?

Answer:

Yes.

The police, upon arriving at the store, in a quiet and peaceable manner, requested, in accordance with the wishes of the manager, that petitioners peaceably leave the counter. Petitioners again refused to move. What course was there for the police officers to take at that point? There were only two courses open. They could have, by the use of physical force and violence, evicted petitioners from the counter. Would not this, in itself, have been a disturbance within the meaning of the statute? We think that the answer is obvious. And who, in fact, would have been the cause of the disturbance? Again the answer is obvious. The petitioners,—in going on private property for the avowed purpose of an unwanted demonstration and in subsequently refusing to move from private property

when requested to do so by the owner,—were the cause.

The only other course that the police officers could take at that point was the one that they did take. They arrested the petitioners and charged them with violation of the statute in question in that they did commit an act or acts which they could, and should have, forseen would result in unreasonably disturbing or alarming the public.

Petitioners state at page 13 of their application for writs that "there is no evidence that any customer in the store complained about or objected to petitioners' presence at the white lunch counter"; no testimony that the disturbance which the manager "feared . . . might occur" actually ever did occur or even that there was any imminent danger of a disturbance." We respectfully submit that in the absence of the arrest by the police officers the manager would have had to use physical force and violence to evict petitioners and protect his rights, which action would not only have caused a disturbance but would have resulted in the violence and grave disorder that had occurred in many other cities throughout the South.

We respectfully submit that the action of the manager and local law enforcement officers should be commended rather than condemned in preventing, before it started, the violence, pitched battles, and complete disruption of an otherwise orderly community which occurred in other cities throughout the south

as a result of these unwanted demonstrations on private property.

Therefore, respondent respectfully submits that the rule laid down in the *Louisville* case is not applicable in the case at bar. There was ample evidence here to justify the courts decision and conviction. The defendant in the *Louisville* case *was welcome on the premises, was a frequent patron of that establishment, and was there for a normal reasonable purpose knowing that he was welcome.* In the instant case, *petitioners were not wanted* at the lunch counter in question, *knew that they were not wanted,* went *there for the avowed purpose of carrying on and participating in an unwanted demonstration and not for the purpose of normal and reasonable use of the facilities of the store that were available to them.*

Therefore, the judgment below does not conflict with the law as declared by this Court in the case of *Thompson v. City of Louisville* and there is no "contradiction posing a grave constitutional issue" which this Court should further consider by granting the writs applied for.

B.

The statute under which petitioners were convicted, as applied to convict them, is not so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment as construed in applicable decisions of this Court.

The Louisiana Statute under attack here is LSA-RS 14:103, which reads in part as follows:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public . . . (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

The attack here is based upon the premise that the statute does not sufficiently define the offense of disturbing the peace. Petitioners, on page 14 of their application for writs, state that " . . . no conventional understanding of the meaning of the words of the statute explains or supports the determination of guilt on the present record . . . ". To the contrary, the offense "disturbing the peace" or "breach of the peace" and the words used in the instant statute have had a clear and conventional meaning in the State of Louisiana, and in fact, every state of the union, since the very beginning of this nation.

As stated in *8 AM. Jur. 834*, "in general terms, a breach of the peace is a *violation of public order*, a *disturbance of the public tranquility, by an act or conduct inciting to violence or tending to provoke or excite others to break the peace* . . . it may consist of an act of violence or *an act likely to produce violence*. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, *tending with sufficient directness to break the peace, no more is required. Nor is actual personal vio-*

lence an essential element in the offense." (emphasis supplied)

At page 835 of the cited text, it is stated that "by 'peace' as used in the law in this connection, is meant the "*tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons* in political society. It is, so to speak, that invisible sense of security which every man feels so necessary to his comfort, *and for which all governments are instituted. Conduct need not be such as is calculated to put one in fear of bodily harm or to have had that effect* in order to constitute a breach of the peace." (emphasis added)

Furthermore, *American Jurisprudence* states a principle, and cites cases in support thereof, which would seem to specifically cover the case at bar. At page 835 thereof, the following principle is set forth:

> "An act which if committed at a certain place or time would not amount to a breach of the peace may constitute a crime if committed at another time or place and under different circumstances. In other words, whether or not a given act amounts to a breach of the peace can only be determined in the light of the circumstances attending the act, and the time and place of its commission."

American Jurisprudence, as authority for the above principle, cites cases from almost every state in the Union and also decisions of this Honorable Court.

One of the cases cited by petitioners as supporting their theory actually supports the above enumerated principals and the decision of the Louisiana Supreme Court in the instant case. At page 17 of their application for writs, petitioners cite the case of *Cantwell v. Connecticut*, 310 US 296. An examination of that case reveals that the defendant there was engaged in activities promoting his religion on the public streets of New Haven, Connecticut and when asked to stop the objectionable activity and leave, did so immediately. As the Court stated at page 303 of the decision, "on being told to be on his way he 'Cantwell' left their presence".

The Court further found, as stated at page 308 of the reported decision, that " . . . Jessie Cantwell, . . . *was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others* . . . ". Also, the Court found, as stated on page 310 of the decision that ". . . we find only an effort to persuade a *willing listener* to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be a true religion." (emphasis supplied by writer)

Throughout the *Cantwell* decision, this Court reaffirms the principles set forth in *American Jurisprudence*, and the cases cited therein, as set forth above. The Court said at page 308 of the *Cantwell* decision that "the offense known as breach of the peace embraces a great variety of conduct destroying

or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others." At page 309 of that decision the Court said "one may, however, be guilty of the offense if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventualities be intended."

The decision of this Court in the *Cantwell* case, on considering the facts in that case, seems, to this writer, to say that Cantwell was at a place that he had a right to be, that is, the public streets of New Haven, Connecticut, doing what he had a right to do, that is, promoting his religion and that the statute involved could not prevent him from doing that. Again, that decision is not applicable to the facts in the instant case. Here, petitioners were not "upon a public street where they had a right to be". They were upon private property where they were not wanted and from which they had been asked to leave.

It is interesting to note, in connection with this aspect of the case raised by petitioners, that on the day or days immediately preceding these arrests, many members of the Negro race, possibly including the petitioners, paraded on the public streets of Baton Rouge in protest against segregation. Not only were they not arrested for these public demonstrations of their belief, but the very same law enforcement officials involved in this case, assisted them in publicly expressing their opposition to segregation, by preventing other persons, members of the white race,

from interfering with their right to peaceably demonstrate and picket in the promotion of their particular beliefs or views. We mention this to point up the difference between the true factual circumstances in the instant case and those in the *Cantwell* case.

Petitioners cite three other cases with the *Cantwell* case in support of their theory. The case of *Herndon v. Lowry*, 301 US 242, involved a member of the communist party and the construction of a Georgia statute dealing with an "attempt to incite insurrection" as construed by the Georgia Court. This case involved the construction of a very lengthy statute employing many words which did not have a usual or conventional meaning. However, even there, there was a very strong dissent and the Court was evenly divided, five (5) to four (4), as to whether or not even that lengthy and involved statute was so vague and indefinite as to violate the Fourteenth Amendment. In the instant case, the statute is much shorter, simpler and uses words which have a common and ordinary conventional meaning. The case of *Watkins v. United States*, 354 US 178, cited by petitioners, is even less applicable to the case at bar as it involved completely different facts and statutes. It involved the right of a congressional committee to punish for contempt for the failure to answer questions thought not to be pertinent to its inquiry. It has no application to the case at bar. The case of *Scull v. Virginia*, 359 US 344, is likewise inapplicable. It involved the rather lengthy and inarticulate testimony of the Chairman of the Vir-

ginia Legislative Committee as to what portions of an inquiry of that committee were applicable to the defendant in order that the defendant might try to decide what questions he could legally be required to answer. We respectfully submit that there can be no comparison between the lengthy and involved "purposes of the committee's inquiry, rather confusing testimony of the chairman of the committee as to which portions of the inquiry related to the defendant," and the simple, concise, uninvolved, conventional language used in the statute under question.

The other cases cited by petitioner in support of the proposition that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes" are likewise inapplicable on their facts. In the case of *Lanzetta v. New Jersey*, 306 US 451, the language involved in the statute was the term "gangster" as defined to be "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, . . . ".

The primary trouble with the statute was the use of the word "gang" and the phrase "known to be a member" which have no common ordinary meaning or are susceptible to several different ordinary meanings. We submit, as will be discussed hereinafter, that the words "disturb and alarm the public" have a common and ordinary meaning that are not so vague, as the Court pointed out on page 453 of its decision, "that men of *common intelligence* must necessarily guess at

its meaning . . . ". (emphasis supplied). The cited case of *Raley v. Ohio*, 360 US 423, is clearly inapplicable as it deals not with the construction of a statute but with the, first, explicit instruction of a chairman of a legislative committee that the Fifth Amendment privilege was available to witnesses testifying, and, second, a subsequent prosecution for pleading the privilege when there was an existing "immunity statute" in effect in Ohio. As this Court said on page 438 of the opinion, there were not only "commands simply vague or even contradictory. There was active misleading." And that to support the conviction would be to "sanction the most indefensible sort of entrapment by the state—convicting a citizen for exercising a privilege which the state clearly had told him was available to him". Obviously, this case has no relation to the case at bar. The cited case of *United States v. L. Cohen Grocery Company*, 255 US 81, involved a statute which provided in part that "it is hereby made unlawful for any person to make *any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries;* . . . ". As the Court said at page 89 of the opinion, in discussing whether or not the words in this statute provided an ascertainable standard of guilt, "that they do not, . . . , so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary". We agree with the Court that the language itself is so clearly vague and uncertain and sets no ascertainable standard of guilt, that there is no need

to discuss it further. Again, the language in the *Cohen* case and the statute involved is so far removed from the statute involved in the instant case that the *Cohen* case, on its facts, is clearly inapplicable here. Also, the cited case of *Connally v. General Construction Company*, 269 US 385, deals with a statute completely different from the statute here involved. The language involved in that statute was "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guard, etc. . . . ". Such a provision would require the ordinary citizen, in order not to violate the act, to make an extensive and detailed study of wage conditions in the community. Such language is far removed from the simple concise language of ordinary meaning contained in the statute at bar. The Court did, however, discuss at some length the question of whether given legislative enactments were wanting in certainty and the basis for deciding same. The Court said at page 391 of the opinion and we quote at length below:

> "In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statements; but it will be enough for present purposes to say generally that the decisions of the Court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly

> apply them, *Higrade Provision Company v. Sherman*, 266 US 497, 502, 45S. CT. 141, 69L. Ed. 402; *Omaechevarria v. Idaho*, 246 US 343-348, 38S. CT. 323, 62L. Ed. 763, or a well settled common law meaning, *not withstanding an element of degree in the definition as to which estimate might differ, Nash v. United States*, 229 US 373-376, 33S. CT. 780, 57L. Ed. 1232; *International Harvester Company v. Kentucky, Supra*, at page 223 (34S. CT. 853), or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Company*, 255 US 81, 92, 41S. Ct. 298, 301 (65L. Ed. 516, 14 ALR 1045), "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded".

We again submit that the cases cited by petitioners are again, on their facts, inapplicable to the case at bar.

This Court also discussed this question rather thoroughly in the case of *Nash v. United States*, 229 US 373-376, 33S. Ct. 780, 57L. Ed. 1232. In that case this Court quoted with approval the statement that "*the criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct*". (Emphasis added) The Court was there dealing with the Anti-trust Act, the language of which, goes far beyond the statute presently before the Court in being involved, complicated and not having the certainty that men of "common intelligence" could reasonably ascertain its

meaning. The Court upheld the act as against this contention.

The Supreme Court of the State of Louisiana in the case of *Town of Ponchatoula v. Bates*, 173 La. 824, 138 So. 851, in considering a "disturbing the peace" ordinance which had no definition within its frame work, made the following comments:

> " . . . the first objection raised is that the ordinance does not define the offense of disturbing the peace; that is, does not set out what acts shall constitute a disturbance of the peace.
>
> "It was not necessary that the ordinance define the offense, for the reason that no better definition for the offense could be found than that contained in the ordinance itself. To disturb means to agitate, to arouse from a state of repose, to molest, to interrupt, to hender, to disquiet. If the framers of the ordinance had attempted to define the word 'disturb' they could have done no better than to say that the word means to agitate, arouse, perplex or disquiet. But why attempt a definition when each of those words has practically the same meaning as the word 'disturb'? . . .
>
> "It is further contended that the ordinance should have specified the particular acts necessary to be done in order to constitute a disturbance of the peace. It would be difficult indeed to specify in an ordinance all the different acts by which the peace and quiet of the inhabitants of a town might be disturbed. A disturbance of the peace may be created by any act or conduct of a person which molest the inhabitants in the

> enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes encitement, unrest, disquietude, or fear among persons of ordinary normal temperament. Such acts to come within purview of the ordinance must be voluntary, unnecessary, and outside or beyond the ordinary course of human conduct . . . ".

This case and its holding, has never been reversed and is still the law of the State of Louisiana. It has been the law, as enunciated by the State Supreme Court, since it was decided in 1932.

The cited case of *State v. Sanford*, 203 La. 961, 14So. 2nd 778, is similar, on its factual situation, to the *Cantwell* case, cited above, as decided by this Honorable Court. It involved a statute similar to the one in the instant case. Briefly, the defendants were members of Jehovah's Witnesses, a religious sect and had been warned by the Mayor of Logansport, Louisiana, that the people in Logansport did not agree with the tenants preached by Jehovah's Witnesses; that if they, the defendants, attempted to disseminate their literature in Logansport a disturbance would likely occur, and that they should not so do. After this warning, the defendants, came upon the public streets of Logansport and in an orderly manner attempted to distribute literature of their religion by offering same to other people on the public streets and if such offer was declined went on to the next person. There was no violence or disturbance and *no attempt by the members of Jehovah's Witnesses to force their reli-*

gious beliefs and their religious literature on unwilling persons.

It is to be noted here that the facts in this case and in the *Cantwell* case, cited above, and decided by this Court, differ in at least two important respects from the facts in the case at bar. In both this case and the *Cantwell* case, the defendants were utilizing the public streets, where they had a right to be, to disseminate or distribute their religious beliefs to persons who were willing to listen. And even in the *Cantwell* case when there was objection by two persons to the anti-Catholic record, the defendant immediately stopped playing the record and left. *In the instant case, defendants were not on the public streets where they had a right to be, they were on private property where they knew, or reasonably should have known, they were not wanted, conducting a demonstration that they knew, or should have known, was not wanted on those private premises, and after being asked to leave the private premises, refused to do so.*

The Louisiana Supreme Court in the *Sanford* case merely held that the statute involved was not applicable to the facts in that particular case. It did not declare the statute to be unconstitutional and said statute has never been declared unconstitutional by the Supreme Court of the State of Louisiana. In fact, it has been used many times since to prevent disturbances of the peace by members of the white race as well as by members of the Negro race.

The facts in the instant case are more nearly similar to the facts existing in the case of *State v. Martin et al*, 199 La. 39, 57So. 2nd 377 (1941) in which the defendant there was also a member of Jehovah's Witnesses. The defendant, in order to promote her religion and distribute its literature, went onto property of a Mrs. Mackey, who after being informed by defendant of the purpose of her visit promptly ordered the defendant off "the private premises". The defendant then left the home of Mrs. Mackey but went to other homes on the farm owned by Mrs. Mackey, again for the same purpose of promoting her religion and distributing its literature. After Mrs. Mackey found that defendant was still on her land, she ordered the defendant to leave, and the defendant refused to do so. Mrs. Mackey then filed a complaint against the defendant charging her with committing trespass.

After trial, the Louisiana Supreme Court upheld the conviction as not being a violation of the Fourteenth Amendment and First Amendment of the United States Constitution with the following comment:

> "These guarantees of freedom of religious worship and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begins. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, does not con-

flict with the law which forbids a person to trespass upon the property of another . . . ".

Respondent respectfully submits that the term "disturb or alarm" as used in the statute under attack has a clear, common, conventional meaning and that any reasonable person of "common intelligence" can ascertain whether or not his acts come within the prohibition of the statute. *Black's Law Dictionary, 3rd edition*, defines disturb as follows:

> "Disturb. To throw into disorder; to move from a state of rest or regular order; to interrupt a settled state of, to throw out of course or order."

It defines disturbance as "any act causing annoyance, disquiet, agitation or derangement to another, or interrupting his peace, or *interfering with him in the pursuit of a lawful and appropriate occupation* or contrary to the usages of a sort of meeting in class of persons assembled that interferes with his due progress or irritates the assembly in whole or in part." (emphasis supplied) *Richardson v. State*, 5 Tex. App. 472; *State v. Stouff*, 11 Wash. 423, 39 P. 665; *George v. George*, 47 N. H. 33; *Varney v. French*, 19 N. H. 233; *State v. Mancini*, 91 Vt. 507, 101 A. 581, 583.

The new *Century Dictionary* defines disturb as follows:

> "To throw into commotion or disorder; agitate; disorder; disarrange; unsettle; also, to interrupt the quiet, rest or peace of; disquiet; also, to agitate the mind of; . . . an outbreak of disorder; a breach of public peace; in law *inter-*

ference with the peaceful exercise of a right or privilege." (emphasis supplied)

The same dictionary defines "alarm" as follows:

> " . . . a warning notice, as of danger; a signal; . . . also, painful excitement due to sudden apprehension of danger; sudden fear; . . . also, to disturb with sudden fear; to fill with alarm . . . . "

Respondent respectfully submits that there have been, over so great a number of years, so many statutes in so many states, so many ordinances in so many towns, throughout our nation, which prohibit "disturbing the peace" many without any other definition than the offense itself, and many with a definition, at least similar to the statute under attack, in the use of the words "disturb or alarm the public", that these terms have a common, ordinary, conventional and well understood meaning which any reasonable man, or person of common intelligence, may determine whether his proposed conduct or acts come within the prohibition of the statute under the rules laid down by the Louisiana Supreme Court and by this Honorable Court in meeting the requirements of the Fourteenth Amendment to the United States Constitution.

We have already referred the Court to *Volume 8 of American Jurisprudence page 835, Section 4*, and cases cited therein, which states that an act which if committed at a certain place or time would not amount to a breach of the peace may constitute a crime if

committed at another time or place and under different circumstances. In other words, whether or not a given act amounts to a breach of the peace can only be determined in the light of the circumstances attending the act, and the time and place of its commission. Under the time and circumstances involved in this case, that is, the petitioners knowing of the violence and disorder which had attended almost every sit-in demonstration conducted in other cities of the South, their avowed purpose in going on private premises for the purposes of participating in a demonstration to protest segregation, and their subsequent refusal to leave the private premises, after being requested to do so, it would appear clear that their acts were deliberate and did constitute a breach of the peace. Furthermore, breach of the peace does not mean that violence is essential. It is not necessary that an act have in itself any element of violence in order to constitute a breach of the peace. For support of this contention we would refer the Court to cases cited above and to *9 Corpus Juris 386, 387, section 1 and 2*, and cases cited therein.

Therefore, respondent respectfully submits that the statute under attack, as applied to these defendants, is a valid enactment of a state legislature, and does not offend the due process clause of the Fourteenth Amendment.

C.

The decision below does not conflict with prior

decisions of this court which condemn racially discriminatory administration of state criminal laws.

The statements contained in the first paragraph on page 18 of petitioners application for writs are erroneous in their interpretation of the record and the testimony. A brief examination of that testimony will indicate this to be true.

On page 10 of the transcript of the testimony of Mr. R. R. Mathews, Manager of Kress' Store, the following questions and answers appear:

Question:
Why did you advise these defendants to go over to the other cafe counter seats?

Answer:
Because by custom we serve colored people at the other counter.

Question:
That's the custom of your store?

Answer:
Right.

Redirect Examination

Counsel Roy:

Question:
That's the custom, not of your store but the custom of your employer, is that right, custom of the people you work for, not your custom?

Answer:
Correct.

Furthermore, the testimony of Captain Robert Weiner, also as contained in the transcript of testimony as contained in the record, indicates that he was acting pursuant to the request of the manager of the department store and he considered the defendants as violating the statute because they remained at the counter in the store reserved for other persons after they had been directed and requested to go to another portion of the store. (RT11-14) The fact, as contained in the testimony, that other Negroes were in other areas of the store with consent of the manager, and were not arrested, clearly indicates that this was not state action against the Negro race.

The real question, and the only question, presented by Articles 5 and 6 of petitioners' Motion to Quash (RQ7-10) and Reason 1 (C) of their application for writs, pages 18 thru 22 of said application, is whether or not a private property owner and proprietor of a private establishment has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine. If the private proprietor has such right to serve or not serve, then a second question is immediately presented. Must he resort to physical force and violence to make unwanted persons leave his establishment, thereby creating a disturbance, or may he call upon local law enforcement agents to protect his rights and either evict the unwanted persons by force or arrest them for committing an act in such a manner as to unreasonably alarm or disturb the public.

In the case of *State v. Clyburn*, 247 North Carolina 455, 101 S.E. 2nd, 295, the North Carolina Supreme Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the Appellate Courts of this Nation. *Madden v. Queens County Jockey Club*, 72 NE 2nd 697 (New York); *Terrell Wells Swimming Pool v. Rodiguez*, 182 SW 2nd 824 (Texas); *Booker v. Grand Rapids Medical College*, 120 NW 589 (Michigan); *Younger v. Judah*, 19 SW 1109 (Missouri); *Goff v. Savage*, 210 P 374 (Washington); *De La Ysla v. Publix Theatres Corporation*, 26 P 2nd 818 (Utah); *Brown v. Meyer Sanitary Milk Company*, 93 P 2nd 651 (Kansas); *Horn v. Illinois Central Railroad Company*, 64 NE 2nd 574 (Illinois); *Coleman v. Middlestaff*, 305 P 2nd 1020 (California); *Fletcher v. Coney Island*, 136 NE 2nd 344 (Ohio); *Alpaugh v. Wolverton*, 36 SE 2nd 906 (Virginia)."

In further support of this proposition, we would refer the court to the *Civil Rights Cases*, 109 US 3, 3 S. Ct. 18, 27 L.Ed. 35, and the cases of *Williams v. Howard Johnson Restaurant*, 268 Federal 2nd 845 and *Slack v. Atlantic White Tower System*, 181 F. Supp. 124. The *Howard Johnson Restaurant* case was decided by the Fourth Circuit Court of Appeals on July 16, 1959. The opinion of the court was written by Judge Soper and was joined in by Chief Judge Sobeloff and Circuit Judge Hayneswort. We men-

tion Judge Sobeloff because he was Solicitor General of the United States at the time of the school segregation decision and wrote a brief on behalf of the United States attacking segregation in public schools.

The court pointed out that the Fourteenth Amendment was prohibitory upon the States only, so as to invalidate all state statutes which abridged the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate on the actions of individuals, which are within the domain of state legislation.

In that case the court held:

> "The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.
>
> This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some *positive provision of state law* they do not furnish a basis for the pending complaint. . . . the customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amend-

ment. As stated by the Supreme Court of the United States in *Shelly v. Kramer*, 334 US 1, 68 S. Ct. 836, 92 L. Ed. 1161:

> 'Since the decision of this court in the Civil Rights Cases, 1883, cited above, the principal has become firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That amendment erects no shield against merely private conduct however discriminatory or wrongful.'

> . . . as an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above, and thus, is at liberty to deal with such persons as it may select. Our conclusion is, therefore, that the judgment of the District Court must be affirmed." (emphasis added)

And in *Slack v. Atlantic White Tower System*, cited above, the court, in its opinion, said in part that " . . . (3) in the absence of statute, the rules are well established that an operator of a restaurant has a right to select the clientele he will serve and to make such selection based on color, if he so desires . . . "

The present prosecution of the petitioners is not based upon any law of the State of Louisiana requiring segregation of the races in private establishments. In fact, no such state law exists. The State of Louisiana has never attempted to tell the owners of private establishments that they must maintain segre-

gated facilities. Neither has the State of Louisiana ever attempted to tell the proprietors of private establishments that they must maintain integrated facilities. "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the constitution. In fact, it does not owe its origin to the constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." *11 Am. Jur., Constitutional Law, section 335.*

If then, the private proprietor had the right legally to refuse service and thereafter require them to leave, did he not also have the right to forceably remove them. We submit that it is axiomatic that he did. In support of this proposition we would refer the court to *9 ALR, page 379; 4 Am. Jur., Assault and Battery, section 76, page 167; and 6 Corpus Juris Secundum, Assault and Battery, section 20, page 2.* Thus, it is said in *4 Am. Jur. Assault and Battery, section 76, page 168;* "even though the nature of the business of the owner of the property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on

his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion in not wrongful." It is also said at *6 Corpus Juris Secundum, Assault and Battery, page 821*, that "the motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose."

In the recent case of *Griffin et al v. Collins et al* decided August 25, 1960, by the United States District Court, District of Maryland, and reported at *187 F. Supp. 149*, which was a class action to prevent the arrest for trespass of Negroes who visited the Glenn Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator, the plaintiff's prayed that the court "A. Adjudge and declare that the defendants acts in utilizing governmental authority and powers of the state and the sanctions of state law to aid, support and enforce the denial to plaintiff, solely because of their race, of admission to Glenn Echo Park and enjoyment of its facilities, are in violation of plaintiffs rights under the constitution and laws of the United States; . . . "

The facts in that case were that the plaintiffs had entered the amusement park and after having been told to leave, refused to do so, and the private guard, acting pursuant to his authority as a Special Deputy Sheriff for Montgomery County, did arrest the plaintiffs for violation of the Maryland Code. The plain-

tiffs were orderly and there was no physical disturbance.

The court in its decision made the following correct statement of the law:

> "Plaintiffs concede the right of the corporate defendants, as owners and operators of Glenn Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants like other property owners or operators of a private business may use "self-help" to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argued, however, that if the proprietor of a business calls a police officer, deputy sheriff, or other state officials to remove or arrest the Negro, such action or arrest would (1) violate the equal protection and due process clauses of the Fourteenth Amendment, which forbids state imposed racial discrimination in the field of recreational activity, and (2) deprive the Negro of his rights under 42 USCA 1981 and 1983. . . .
>
> *Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights. . . .*" (emphasis supplied)

We respectfully submit that the legal principal, as stated by the Federal District Court in the above decision, is the correct legal principal and applies with full force and vigor to the present cases. The proprietors herein, rather than resort to physical force

resulting in a fight and disturbance, exercised their right to call upon peace officers to protect their rights. We submit that the instant cases comes squarely within the purview of the legal principal quoted above.

Most of the cases cited by petitioners in their application, and particularly *Gibson v. Mississippi*, 162 US 565; *Buchanan v. Warley*, 245 US 60; *Holmes v. City of Atlanta*, 350 US 879; *Gayle v. Browder*, 352 US 903; *State Athletic Commission v. Dorsey;* 359 US 533; *Evers v. Dwyer*, 358 US 202 and *Yick Wo v. Hopkins*, 118 US 356, are cases involving either an actual existing state law which required segregation, or the administration of a state law so as to discriminate against a particular group or class.

Such is not the case here. The state law prohibiting "disturbing the peace" applies equally to all persons whether white or Negro, male or female, rich or poor, or otherwise. The statute does not require segregation and does not provide a penalty for failure to segregate.

To permit the contention of plaintiffs herein to be established as the law of this nation would be to completely obliterate and trample the rights of owners of private property to keep unwanted persons off their property. It would further prohibit almost any one from calling upon peace officers to protect their rights. We respectfully submit that no portion of the Constitution requires such a state of affairs to exist.

D.

The decision below does not deprive plaintiffs herein of the freedom of speech, or expression, guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Here, petitioners attempt to bring their position under the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment on the basis of two arguments, and cases cited in support thereof, both of which are inapplicable to the instant case.

First, they claim that their right to express their opposition to segregation customs is guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. The State of Louisiana did not, and we do not here, deny their right to express themselves as being in opposition to the custom of segregation. The fact that the state does not deny them such right is clearly shown by the fact that at the time these "sit-ins" took place, these petitioners, and/or others in a similar position, picketed one or more of these establishments by marching up and down the streets and sidewalks of the City of Baton Rouge with placards and posters. They were not interfered with by the police and no arrests were made. In fact, the police department of the City of Baton Rouge maintained officers in the area of the picketing to insure these petitioners their right to freely express their opinion as guaranteed by the First Amendment. Furthermore, these petitioners, and/or others in a similar

position, marched on the State Capitol and again engaged in a loud demonstration voicing their protest of segregation. Once again, the police department of the City of Baton Rouge not only did not interfere with their right to do so, but actually maintained officers for the purpose of seeing to it that other people did not interfere with their right to freely express their opinion on the public streets of the City of Baton Rouge as guaranteed by the First Amendment.

It would seem apparent from these facts, which are common knowledge, that the state did not, and does not, deny these petitioners, and/or others in a similar position, the right to freely express themselves in a lawful manner.

We do however question their right, or anyone else's right, regardless of race, color or creed, to express themselves on any subject on private property without having been invited to do so by the owner, and particularly, when the owner has made it apparent that he does not want them on his premises.

The cases cited on page 23 of petitioners' brief in support of the right to picket, to distribute handbills, to display motion pictures, to join associations, and to display a flag or symbol, are clearly not applicable to the instant cases. By calling a "sit-in" a symbol, petitioners infer that the right to "sit-in" is unrestricted and may be done at any time and at any place regardless of other circumstances and regardless of the rights of other citizens. This, of course, is a false inference. No one questions the exercise of these rights by the

petitioners if exercised at a proper place and hour. However, it is not an absolute right.

The answer to such contention is given by the court in *Kovacs v. Cooper*, 336 US 77, 93 L. Ed. 513, 10 ALR 2nd 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Sala* case recognized that in this field by stating "the hours and place of public discussion can be controlled." It was said decades ago, in an opinion of this court delivered by Mr. Justice Holmes in *Schenck v. United States*, 249 US 47, 52, 63 L. Ed. 470, 473, 39 S. Ct. 247, that: "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism.* The right to speak ones mind would often be an empty privilege in a place and at a time *beyond the protecting hand of the guardian of public order.*" (emphasis added) This principal is still embodied in our law under the latest decisions of this Honorable Court.

Petitioners then cite the case of *Terminiello v. Chicago*, 337 US 1, in further support of their right to freedom of expression even though it induces a condition of unrest or even stirs people to anger. Although, we do not admit that petitioners right to freedom of expression is so unrestricted as to allow them

to create unrest and anger to the point of inciting riot, we point out, in answer to their citation of the *Terminiello* case, that their right to express themselves in opposition to segregation, when done at a proper time and place, has not been denied to them. To the contrary, local police officials protected their right to so do as demonstrated by the protected picketing and marching on the State Capitol.

The second argument urged by petitioners in order to bring their action under the protection of the First and Fourteenth Amendments is based upon the decisions of this court in the cases of *Marsh v. Alabama*, 326 US 501 and *Cantwell v. Connecticut*, 310 US 296, which have been discussed hereinabove. Again the argument made, and the cases cited, are inapplicable to the present situation as in the *Cantwell* case the defendants, contrary to the situation here, were espousing their religious beliefs on the *public streets of a town* and when they were asked to cease the offensive action, immediately did so.

Again, in the *Marsh* case, the court found that the defendants were expounding their views on the *public streets* of a town which was *public in nature.* Although we do not here admit to the correctness of the courts decision in the *Marsh* case, in holding that private property, merely because a large number of people live thereon, becomes public in nature, we would point out that *this court*, before upholding the defendants right to espouse his personal views thereon, *first felt constrained to find that the property in-*

volved had become public in nature. There can be no doubt that the property here involved was purely private in nature.

On page 26 of their application petitioners cite the words of Justice Holmes in the *Schenck* case in support of the proposition that a "clear and present danger" must be found. Again, that is not the question here. The only question here is where the free expression may take place. Do the petitioners have a complete unrestricted and unfettered right to express themselves on any subject on anyone's private property, whether business or home, and even though unwanted thereon? We respectfully submit that they do not.

In their concluding paragraph on page 26, petitioners assert that the state has the power to prevent only two evils: (1) disturbance of the peace; (2) non-segregation at lunch counters—and then state that there was no clear and present danger as required by the *Schenck* case and that the state has no power to compel segregation, citing *Brown v. Board of Education*, 347 US 483 and *State Athletic Commission v. Dorsey*, 359 UC 533. They then conclude by saying " . . . having no valid interest to preserve, the state has no power to impose criminal penalties for the expression in which petitioners here engage."

However, petitioners completely ignore a third very important and very valid interest which any state or government has the right to preserve—that is, the right of other citizens to be secure in the quiet

and peaceful enjoyment of their private property. "The right of property is a fundamental, natural, inherent, and inalienable right . . . it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, *the protection of which is one of the most important objects of government.*" *11 Am. Jur., Constitutional Law, section 335.*

CONCLUSION

There can be no doubt in the mind of the court, or anyone else, that the demonstrations involved herein were deliberately planned and organized. Petitioners, at page 23 of their brief, state "their presence at these counters expressed in Baton Rouge what thousands of other Negro students have been manifesting throughout the nation . . . " And again at page 27, "this case presents issues posed by numerous similar demonstrations throughout the nation . . . " Nor can there be any doubt that the property on which petitioners engaged in these demonstrations was private property. Petitioners cite no case in which Kress's Department Store, or any other department store, has ever been held to be a public body by this court or any other court. Neither can there be any doubt that the manager and owner of the stores in question did not want any such demonstration on their private property. The testimony of the manager, as contained in the trial record, explicitly makes this clear. Furthermore, there can be no doubt that these petitioners *knew* that such a demonstration was unwanted. Not only would

they have known it from being residents of Baton Rouge, but in their Motion to Quash, they specifically state that they did, "in protest of the segregation laws of the State of Louisiana, . . . "sit-in" a cafe counter seat reserved for members or persons of the white race, . . . " Furthermore, there can be no doubt that, these petitioners knew, because of the results of other such demonstrations in other towns throughout the South, that their unlawfully remaining on private property could foreseeably result in violence and disorder.

Petitioners here, instead of lawfully and peaceably expressing themselves by picketing, by the use of newspapers, radio and television, or by mass meetings on private property to which they had been invited, deliberately, and as part of a well organized nationwide plan, proceeded to intrude on the private property of other citizens to engage in unwanted demonstrations. To uphold their right to so do, is to trample the rights of all other citizens.

These defendants were convicted of violating a valid state statute which they knew, or reasonably should have known, they were violating. The statute in question applies to everyone equally, regardless of race or color, and is not designed, nor applied, to enforce racial discrimination. Their right to lawfully express themselves was not only not denied but was in fact protected by the very same law enforcement officials that they herein condemn.

The contention that the decision below, if allowed to stand, will in effect undermine numerous decisions of this court striking down state enforced racial discrimination is ridiculous. The examples cited on page 29 of petitioners application, ie, state statutes requiring segregation on buses; state statutes requiring segregation at athletic events; and state statutes requiring segregation in schools, could not possibly be affected.

If the defendants have the right to be at the place where their acts are done, such as buses, schools, etc., the convictions would not stand as long as their acts were lawful. The trouble with petitioners argument here is, that *they had no right to do what they did at the place that they were.*

In conclusion, we respectfully submit that allowing the decisions below to stand will merely reaffirm the right of all citizens, regardless of race or color, to be secure in the use and enjoyment of their private property; and to be secure against unwanted intrusions and demonstrations. A right which also deserves the protection of the Constitution and this Honorable Court.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 617

JOHN BURRELL GARNER, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

ADDITIONAL COMMENT AND ARGUMENT WITH RESPECT TO THIS PARTICULAR CASE

As set forth at the beginning of this brief, we respectfully submit, in toto, in opposition to the application for writs in this case, the comment, argument, and authority cited in the preceding portion of this brief.

However, because of a very slight difference in the factual situation, we respectfully submit, at this point, additional comment and argument in opposition to this particular petition.

STATEMENT OF THE CASE

On March 29, 1960, petitioners in the instant case, entered the restaurant portion of Sitman's Drug Store in Baton Rouge, Louisiana, seated themselves at the counter and requested service. (RT 9 and 11) This business establishment is solely owned by Mr. Riggs T. Willis, a citizen of Baton Rouge, Louisiana (RT 9 and 12). Mr. Willis, under a long established and well known policy of his, did not serve members of the

Negro race in the restaurant facility (RT 11). After these defendants had seated themselves at the counter in the restaurant and requested service, Mr. Willis, the owner, informed them that they would not be served (RT 9 and 10). Although these defendants knew that the owner of the restaurant did not serve members of their race therein, and although they were specifically told by the owner of the establishment that they would not be served, (RT 9) they refused to leave the premises (RT 10).

At the time this occurred there was a police officer outside of this establishment patroling his customary beat and performing his normal customary duties. This police officer, being a citizen of Baton Rouge, knew, as did all other citizens of Baton Rouge, that the owner of this particular establishment did not serve members of the Negro race in the restaurant. This police officer also knew of the "sit-in" demonstrations which were being done deliberately throughout the South. He was also aware of the violence and disorder which had resulted in other cities because of these demonstrations. This officer, being a capable and well trained police officer, and desiring to prevent any breach of the peace or good order of his community, called his superiors to report what was taking place (RT 14).

His superior officers, Captain Weiner and Major Bauer came to the establishment in response to his call. Upon arriving at the establishment, and also knowing of the policy of the owner of the store not to serve

members of the Negro race in his private restaurant, they requested these defendants to peaceably leave the premises (RT 17). These defendants still refused to leave the premises (RT 17). Then, and only then, were these defendants arrested and charged under the statute in question.

After normal and orderly judicial procedure, in which every right of the defendants was preserved and protected, the Trial Court found the defendants guilty of violating the statute in question. The Trial Court found that these defendants entered this restaurant which, under its policy would not serve them, refused to leave after being told by the owner that they would not be served, and again refused to leave when requested to do so by the police officers.

The Trial Judge, in finding the defendants guilty, said, "the Court is convinced beyond a reasonable doubt of the guilt of the accused from the evidence produced by the State, for the reason that in the opinion of the Court, *the action and conduct of these two defendants on this occasion at that time and place was an act done in a manner calculated to, and actually did, unreasonably disturb and alarm the public*" (RT 18). (Emphasis added)

ARGUMENT

The only difference in facts between this case and the companion *Hoston* case, is that here the owner did not actually call the police. Otherwise the facts are identical. These petitioners, entered upon private

premises where they knew they were not wanted, for the avowed purpose of protesting segregation customs. (see paragraph 7 of "Motion to Quash" as contained in the record). They were told by the owner that they would not be served. They refused to leave. Police officers, in assisting the owner in maintaining his right to refuse service and admission to his private property to whomever he chose, peaceably and quietly requested the defendants to leave. Again, they refused to leave. Only then were they arrested and charged under the statute.

We respectfully submit that this case is therefore identical to the *Hoston* case discussed in the preceding portion of this brief and again reiterate each and every comment and argument made with respect to the *Hoston* case in support of our opposition to the application for writs herein. Under these circumstances, the only way the owner and the police officers could protect the owners rights, which, at this particular place and time, were paramount to petitioners rights, was either to resort to physical violence to eject the defendants or to arrest and charge them as was done. There can be no doubt that the use of physical force by the owner or by the police officers to protect the owners rights would have resulted in, and in fact, would have been, a disturbance within the meaning of the statute. It is common knowledge that violence incites violence. That fights and the use of physical force in public places can often result in complete disorder. Would it have been

better for the owner to physically eject these defendants when they refused to leave? Would it have been better for the police officers to physically eject these defendants when they again refused to leave? We respectfully submit that it would not. That such action would only have resulted in a greater disturbance and greater disruption of the peace and order of our community.

These defendants had no right to be where they were. The owner, to the contrary, did have the right to demand that they leave. He also had the right to physically eject them if he so desired, and, if he had the right to physically eject, "it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." *Griffin et al v. Collins et al*, 187 F. Supp. 149.

Petitioners, in support of their position, cite the case of *Boman v. Birmingham Transit Company*, 280 F. 2nd 531, in fact, petitioners quote therefrom, with emphasis added, the following statement: "The police officers were without legal right to direct where they should sit because of their color." This case involved a public bus transportation system, operating under a franchise granted by the State, and which, because of the franchise, the Court had found to be a *State agency* and therefore *state action* requiring segregation which is prohibited. Such is not the case here.

The establishment involved here was not a public facility, was not operated by or franchised by the state,

and the state had no law requiring segregation on these premises. Consequently, under general principals of law enunciated by this Court many times, and particularly under the rulings in the cases of *Williams v. Howard Johnson Restaurant*, 268 F. 2nd 845 and *Griffin et al v. Collins et al* 187 F. Supp. 149, discussed before, *these police officers did have a legal right to direct the defendants to leave.* If they had the legal right to demand that these defendants leave the premises, they also had a legal right to arrest them for refusing to leave.

In conclusion, we respectfully submit that the instant case is on all fours with the companion *Hoston* case, and, for the reasons cited therein and the foregoing reason, we respectfully submit that the petition for writ of certiorari in the instant case should also be denied.

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 618

MARY BRISCOE, ET AL., PETITIONERS

v.

STATE OF LOUISIANA, RESPONDENT

ADDITIONAL COMMENT AND ARGUMENT WITH RESPECT TO THIS PARTICULAR CASE

As set forth at the beginning of this brief, we respectfully submit, in toto, in opposition to the application for writs in this case, the comment, argument, and authority cited in the preceding portion of this brief.

However, because of a very slight difference in the factual situation, we respectfully submit, at this point, additional comment and argument in opposition to the application for writs in this particular case.

STATEMENT OF THE CASE

This case, on its facts, is also identical to the companion *Hoston* case. On March 29, 1960, petitioners in the instant case, went into the private restaurant in the Greyhound Bus Station, knowing that it was an established policy of the owner and manager not to serve members of the Negro race in such restaurants, sat down therein and demanded service. One of the employees of the restaurant told them that

they would have to go to the other side of the restaurant to be served (RT 14). The employees also requested them to move (RT 13). After these petitioners refused to move, the employee called the police to assist her in maintaining the rights of the owner to refuse service to whomever he desires (RT 13 and 15).

After the officers arrived, pursuant to the request of the employee, they quietly asked the defendants to leave (RT 19, 22, and 23). It was only after they refused to obey the lawful command of the law enforcement officers that they were arrested and charged under the statute (RT 22 and 23).

ARGUMENT

Again, the situation is identical to the companion *Hoston* and *Garner* cases. These defendants went on private property where they knew they were not wanted, for the avowed purpose of staging an unwanted demonstration in protest of segregation customs. (see paragraph 7 of "Motion to Quash" contained in the record). The owner's employee made a legitimate and lawful request for them to leave. They refused to do so. In order to maintain the legal right of the owner, the employee called upon local law enforcement agents for assistance. The law enforcement officers, carrying out their responsibility to protect the rights of all citizens, made a lawful request that the defendants leave. Again, the defendants refused to leave. Then, and only then, did the officers arrest the defendants and charge them under the statute.

Again, we respectfully submit that this case is on all fours with the companion *Hoston* case, and we here reiterate each and every comment, argument and authority cited previously in the *Hoston* case in support of our opposition herein and respectfully submit that the petition for writ of certiorari should be denied.

CONCLUSION

(Submitted with respect to all three cases)

Although petitioners in all three cases allege four questions presented to the Court, all four of these questions rest upon two basic propositions which the petitioners are asking this Court to uphold: 1-That no private business man may choose or select his customers as he sees fit, for whatever reason he chooses, and 2-That even if he does have such legal right, he cannot enforce or protect that right, and in no event may he call upon local law enforcement agencies to assist him in protecting that right, and 3-That law enforcement agents, charged with the responsibility of maintaining peace and order in a community, cannot act to prevent a breach of that peace and order by curtailing acts which could reasonably be expected to result in such a breach of the peace but must wait instead until physical violence and community disorder actually results.

With respect to the first contention, we respectfully submit that the long line of decisions of this Court as cited in *9 ALR 379*, and as held in the *Howard Johnson* case, the *Atlantic White Tower System* case, and others, discussed hereinbefore, stands for the proposition that, " . . . *although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual and to eject such individual from the store if he refuses to leave when*

requested to do so." (emphasis supplied) As was said by Justice Holmes, speaking for the Court in *Terminal Taxi Cab Company v. Kutz*, 241 US 252, 256, 60 L. Ed. 984, 987, a suit to restrain the public utilities commission from exercising jurisdiction over the business of a taxi cab company: "It is true that all businesses, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common calling, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. *It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . .* " (emphasis supplied).

Nor have the petitioners been able to cite any cases which are applicable to the situation which obtains in the instant case. For instance, *Cooper v. Aaron*, 358 US 1, 3 L. Ed. 2nd 5-Public Education; *Bowman v. Birmingham Transit Company*, 280 F. 2nd 531-Public Transportation; *Gibson v. Mississippi*, 162 US. 565-Public Jury Procedures; *State Athletic Commission v. Dorsey*, 359 US 533-State Public Segregation Statute; *State v. Sanford*, 203 La. 961, 14 S. 2nd 778-Use of Public Streets; *Cantwell v. Connecticut*, 310 US 296-Use of Public Streets; *Marsh v. Alabama*, 326 US 501-Use of Public Streets; *Brown v. Board of Education*, 347 US 483-Public Schools; and *Orleans*

Parish School Board v. Bush, 242 F. 2nd, 156-Public Schools.

We respectfully submit that private property has not yet reached the point of socialization and communization that is here contended for by the petitioners.

With respect to the second proposition, we respectfully submit that to say that a private businessman has certain rights with respect to his private property and then say that he cannot enforce or protect those rights is to completely nullify the right itself. We submit that the right of the private business man and property owner here involved is too important, too fundamental, to permit such theory even the dignity of review. "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitution which protects it, for existed before then. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government . . . " *11 Am. Jur., Constitutional Law, section 335.*

Furthermore, the right here involved goes further than mere property rights. It also involves personal freedom. It involves the right of an individual to choose his associates and to decide for himself with whom he shall do business. Certainly this right, particularly when exercised on the

individual's own property, is entitled to as much protection as the right contended for by petitioners, that is, the right to engage in demonstrations in support of their beliefs, and particularly when they urge the maintenance of that right apart from where they have a lawful right to its exercise and to the complete abolition of the rights of others. It would seem particularly true when it is so obvious that the protection of the rights of the private businessman and property owner can be maintained without in any way denying the petitioners the full and public expression of their views.

With respect to the third proposition, we respectfully submit that for this Court to hold that a police officer must wait until violence occurs and cannot take action to prevent such violence, is to invite chaos and disorder in every community throughout our nation. The primary purpose of law enforcement agencies is to prevent disorder rather than to punish for the commission thereof. As was said in the case of *People v Nixon*, 161 NE 463, at page 466;

> "Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties, they may give reasonable directions."

And again, in the case of *People v. Calpern*, 181 NE 572 it was said:

> "Failure, even though conscientious, to obey directions of a police officer, not exceeding his author-

> ity, may interfere with the public order and lead to a breach of the peace."

There is also a very able discussion of whether a refusal to comply with directions given by a police officer could be held to be disorderly conduct in the case of *People v. Arko*, 199 N. Y. S. 402, in which the Court said at *page 405:*

> "The case must present proof of some definite and unmistakeable behavior *which might stir if allowed to go unchecked, the public to anger or invite dispute, or bring about a condition of unrest and create a disturbance.*" (emphasis added)

In the recent case of *State of Maryland v. Dale H. Drews*, et al, decided May 6, 1960, Criminal No. 20084, (unreported) the court there was considering a situation almost identical to the situation in these three cases. In that case five persons, three white and two Negro, entered the Gwynn Oak Amusement Park in Baltimore County, a privately owned amusement park, and attempted to use its facilities. They were advised by employees of the owner that the facility was not open to members of the Negro race. The two Negroes were asked to leave and refused. Then the entire group, both white and Negro, were asked to leave and all refused. Thereafter, the Baltimore County police were called. The police requested the group of five persons to leave the park and they again refused. The period of time between the time of the initial request to leave and the time of actual arrest covered a period

of only ten or fifteen minutes. These five persons were charged with disturbing the peace. The court, after discussing the above referred to case, found that "the facts and circumstances hereinbefore stated offer clear and convicing proof that *public disorder reasonably could be expected to follow if the five persons remained in the park. The order of the police to leave, therefore, was not arbitrary. The refusal of the defendants to leave upon request of the police, under the circumstances described in the evidence, constituted acting in a disorderly manner to the disturbance of the public peace.*" (emphasis added)

We respectfully submit that the principles of law followed there are applicable here and should be adopted by this court in the instant cases.

We respectfully submit that the principles of law involved herein have been long established in the history of our nation and need no further review by this Court. These defendants were convicted under a valid statute of the the State of Louisiana, designed to preserve peace and order in the community, applicable to all persons regardless of race or color, after due and proper judicial process in which defendants were given every opportunity to produce evidence, file motions, etc., and their convicitions need no review by this Court.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari in all three cases should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, John F. Ward, Jr., one of the Attorneys for the State of Louisiana, respondent herein, certify that on the 4th day of March 1961, I served copies of the foregoing Brief of the State of Louisiana in Opposition to Application for Writs of Certiorari to the Louisiana Supreme Court, by mailing the required number of copies, postage prepaid, to Counsel of Record for Petitioners, at the following addresses: A. P. Tureaud, 1821 Orleans Ave., New Orleans, Louisiana; Johnnie A. Jones, 530 South 13th St., Baton Rouge, Louisiana; Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, New York 19, New York.

John F. Ward, Jr.

JOHN F. WARD, JR.
Counsel of Record
for Respondent

Sworn to and subscribed before me, the undersigned Notary Public, within and for the Parish of East Baton Rouge, State of Louisiana, this 4th day of March, 1961.

Notary Public